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Supreme Court, U.S.
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No. 08-395 SEP 24 2008

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In the

Supreme Court of the United States

KAREN STAMP,

Petitioner,

v.

METROPOLITAN LIFE, Metropolitan Life Insurance Company of America Administrator-Benefits; EXXON MOBIL OIL CORPORATION; EXXON MOBIL OIL COPORATION, Exxonmobil Benefit Plan; MOBIL OIL CORP., Life Insurance Protection Plan of Mobil Oil Corporation; MOBIL OIL CORP., Life Insurance Plan of Mobil Oil Corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether an accidental death claim arising out of intoxication is a "loss caused by...intentionally self-inflicted injury...or committing or attempting to commit a felony or other serious crime or assault" but is an "accident" within the plain meaning of the terms and provisions of an insurance policy written and issued and as contemplated by ERISA.

What is the appropriate standard of review which the Court(s) should apply in instances where administrators of an ERISA benefit plan have discretionary authority to construe an ERISA benefit plan, where the terms of the insurance policy at issue are clearly and inherently ambiguous; that is, that of a de novo review or of contra proferentum.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed on the caption.

Pursuant to Supreme Court Rule 29.6, Petitioner Karen Stamp makes the following disclosure:

Karen Stamp is an individual and therefore this document is not being filed by or on behalf of a nongovernmental corporation

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASON(s) FOR GRANTING PETITION 6

I. An accidental death claim arising out of intoxication is not a "loss caused by...intentionally self-inflicted injury...or committing or attempting to commit a felony or other serious crime or assault" but is an "accident" within the plain meaning of the terms and provisions of the insurance policy written and issued by Metropolitan Life Insurance Company to Mobil Oil Corporation and as contemplated by ERISA 8

II. The First Circuit Court of Appeals erred in its analysis by determining that death resulting from driving under the influence of alcohol was

"likely"" to result, in view of the case law which refutes this interpretation and statistical evidence set forth within the record demonstrating the statistical probability of a fatal accident resulting while driving under the influence of alcohol is 1.19%, or approximately One (1) in One Hundred (100). 21

III. The Court should articulate and determine that the appropriate standard of review which the Court(s) should apply in instances where administrators of an ERISA benefit plan have discretionary authority to construe an ERISA benefit plan, where the terms of the insurance policy at issue are clearly and inherently ambiguous, is that of a de novo review and of contra proferentum, not that invoked by the First Circuit Court of Appeals, which ostensibly involves "a more abstract inquiry—the construction of someone else's construction" . 23

CONCLUSION 29

APPENDIX

Appendix A: First Circuit Opinion, dated June 30, 2008 . . . . . 1a

Appendix B: District Court of Rhode Island Memorandum and Order, dated December 13, 2006 . . . . . 36a

TABLE OF AUTHORITIES

PAGE

CASES:

Am. Family Life Assurance Co. v. Bilyeu,
921 F. 2d 87 (6th Cir. 1990) 17, 18

Begay v. United States,
128 S. Ct. 1581 (2008) 7, 21

Calhoon v. Harvey,
379 U.S. 134 (1964) 7

Collins v. Nationwide Life Ins. Co.,
294 N.W. 194 (Mich. 1980) 19, 27

Cranfill v. Aetna Life Ins. Co.,
49 P.2d 703 (Okla. 2002) 19, 20

Dawson Chem. Co. v. Rohm & Haas Co.,
448 U.S. 176 (1980) 7

Delk v. Durham Life Ins. Co.,
959 F.2d 104 (8th Cir. 1992), ... 25

Freeman v. Crown Life Ins. Co.,
580 S.W. 2d 897 (Tex. 1979) 18, 19, 28

Harrell v. Minnesota Mut. Life Ins. Co.,
937 S.W. 2d 809 (Tenn. 1996) 18, 26, 27

King ex rel. Schanus v. Hartford Life and Accident Ins. Co.,
357 F.3d 840 (8th Cir. 2004) 8, 13, 14

Padfield v. AIG Life Ins. Co. of Am.,
290 F.3d 1121 (9th Cir. 2002) 8, 15, 16, 23

Phillips v. Lincoln Nat'l Life Ins. Co.,
978 F.2d 302 (7th Cir.1992) 25

Pilot Life Ins. Co. v. Dedeaux ,
481 U.S. 41, 56, 107 S.Ct. 1549,
95 L.Ed.2d39 (1987) 24

Santaella v. Metro. Life Ins. Co.,
123 F.3d 456 (7th Cir. 1997) 9, 17, 24, 25

Todd v. AIG Life Ins. Co.,
47 F.3d 1448 (5th Cir. 1995) 9, 16, 17, 25

United McGill Corp. v. Stinnett,
154 F. 3rd 1968 (4th Cir. 1998) 24

West v. Aetna Life Ins. Co.,
171 F. Supp. 2d 856
(N.D. Iowa 2001) 9, 14, 15, 27

Wickman v. Northwestern Nat'l Ins. Co.,
908 F.2d 1077 (1st Cir. 1990) ..... *passim*

Winters v. Costco Wholesale Corp.,
49 F.3d 550 (9th Cir.1995) 25, 26

STATUTES AND OTHER AUTHORITIES

Couch on Insurance 2d § 41:9, 13 (3d Ed. 1995 and
2000); 9, 25

13 *Appleman Insurance Law and Practice* § 7401 at 197 (1981) 25

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 and § 1332 2

28 U.S.C. § 2101(c) 1

The Employees Retirement Income Security Act 29 U.S.C. § 1001 *et seq.* 2, 6, 7

Sup. Ct. R. 13.1 1

PETITION FOR WRIT OF CERTIORARI

Now comes Karen Stamp and hereby respectfully petitions the Supreme Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the First Circuit dated June 30, 2008.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the First Circuit, dated June 30, 2008, is unpublished, but unofficially reported at, at 063008 FED1, 07-1061 and is reproduced at App. A., 1a – 36a.

The Decision and Order and Final Judgment of United States District Court for the District of Rhode Island, dated December 13, 2006 is officially reported at 466 F.Supp.2d 422 (D. R.I. 2006) and is reproduced at App. B, 37a-61a.

JURISDICTION

The opinion and judgment of the U.S. Court of Appeals for the First Circuit sought to be reviewed was entered on June 30, 2008. This petition is timely under 28 U.S.C. § 2101 (c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the U. S. Court of Appeals for the First Circuit pursuant to 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are of the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq. This Court has subject matter jurisdiction over the current matter pursuant to 28 U.S.C. § 1331 and § 1332, as her claims under the Employees Retirement Income Security Act ("ERISA") are cognizable under and including but not limited to 28 U.S.C. § 1332 (e) (1).

STATEMENT OF THE CASE

This petition arises out of the First Circuit Court of Appeal's affirmation of the denial of the claim of Karen Stamp, the wife of the late Stephen Stamp, relative to claim(s) asserted for Basic Life Insurance, Basic Life Insurance AD&D Accidental Death & Dismemberment ("AD&D"),Voluntary Basic Accidental Death & Dismemberment ("BAD&D"), and Occupational Accidental Death & Dismemberment ("VD&D") as the designated beneficiary of an employee benefit plan issued to Mobil Oil Corporation, the employer of her late husband, by Metropolitan Life Insurance Company (also referred to herein as "MetLife"). Under the provisions of the policy, Metropolitan Life Insurance Company, is designated as claims fiduciary, and the appellate claims process is administered by Exxon Mobil Chemical Company/Mobil Oil Corporation (also referred to herein as "Exxon/Mobil,"), under the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq.

The group policy issued by MetLife to Exxon Mobil, delivered and governed by the laws of the Employees

Retirement Income Security Act ("ERISA"), provided Basic Life Insurance, Basic Life Insurance AD&D Accidental Death & Dismemberment ("AD&D"), Basic Accidental Death & Dismemberment ("BAD&D"), and Occupational Accidental Death & Dismemberment ("VD&D") benefits to employees of Mobil and their intended beneficiaries including Mrs. Stamp. (App. A, 3a, 6a-7a, App. B41a-45a)

On August 3, 2002, Stephen Stamp, while and traveling from and after attending an Exxon Mobil sponsored event, as a representative of management of Exxon Mobil, died as the result of an automobile accident. Metlife voluntarily paid Mrs. Stamp's claim for Basic Life Insurance benefits in September, 2002. Although Mrs. Stamp filed a claim for Basic Life Insurance AD&D, Accidental Death & Dismemberment ("AD&D"), Voluntary Basic Accidental Death & Dismemberment ("BAD&D") and Occupational Accidental Death & Dismemberment ("VD&D") benefits under the policy issued by Metlife, delivered and governed by the laws of ERISA, and has presented evidence demonstrating entitlement to said benefits, MetLife denied Mrs. Stamp's claim.

More specifically, MetLife denied the claims, premised upon the sole and specific policy provisions and exclusions, which are as follows:

> **"Accidental Death and Dismemberment Provision**
>
> Your contributions to Basic Life Insurance coverage also provide accidental death and dismemberment coverage equal to the amount

of your Basic Life Insurance coverage If you are physically injured as a result of an accident and died within 90 days as a result of that injury or accident, your designated beneficiary will receive the full amount of your accidental death and dismemberment benefit as well as your normal benefit under the Basic Life Insurance.

Exceptions

No AD&D payment will be made for death...caused by...intentional self destruction or intentionally self-inflicted injury...

"Voluntary Accidental Death and Dismemberment Insurance Coverage

As described in Section 2, your Basic Life Insurance coverage includes accidental death and dismemberment coverage of an additional two times annual life insurance pay. If you want a higher level of AD&D coverage... you may elect this coverage in whole multiples on one to eight times annual life insurance pay through Voluntary AD&D insurance."

No other policy provisions or exclusions were cited by or relied upon by Metlife in denying the claims asserted by Mrs. Stamp. Although self-explanatory, the substantive denial of these claims by Metlife was premised upon an apparent finding that:

"In the State of Rhode Island, a person is considered legally intoxicated and incapable of operating a motor vehicle if the blood alcohol

> level is .08 percent or higher. This is because alcohol impairs the drinker's judgment and physical and mental reactions. Here Mr. Stamp's blood alcohol level was over three times the legal limit. The mental and physical impairments caused by excess of alcohol consumption are intentionally self-inflicted injuries that caused the death. In addition, the act of driving while so impaired rendered the infliction of serious injury or death reasonably foreseeable and hence not accidental as contemplated by the plan". (App. B 44a-45a).

The Metlife policy does not contain any specific exclusionary language for injuries and/or death resulting from intoxication. Finally, no specific plan provisions were cited by Metlife to support its proposition that "the act of driving while so impaired rendered the infliction of serious injury or death reasonably foreseeable and hence not accidental as contemplated by the plan". Mrs. Stamp appealed Metlife's denial of the claim to Exxon Mobil on July 20, 2004. Exxon Mobil by correspondence of October 15, 2004, denied Mrs. Stamp's appeal. (App.B, 44-45a)

Under the claim asserted for Basic Life Insurance, Basic Life Insurance AD&D Accidental Death & Dismemberment benefits, Exxon Mobil based its denial on the premise that "by intentionally consuming an excessive amount of alcohol, Mr. Stamp inflicted in injury upon himself. The term injury is normally understood to include physical or mental harm. In this case, Mr. Stamp's alcohol consumption caused a serious (albeit temporary) impairment of his mental and physical capacity to function. This injury caused

his death". As to Mrs. Stamp's claim for Voluntary Basic Accidental Death & Dismemberment benefits, Exxon Mobil denied the claim because the accident which caused Mr. Stamp's death was not "accidental", and that his death was a self-inflicted injury based upon the plan exclusion which reads that "no voluntary AD&D payment will be made for death or loss caused by...intentionally self-inflicted injury...or committing or attempting to commit a felony or other serious crime or assault". Exxon Mobil concluded that "Mr. Stamp was committing a serious crime within the meaning of the plan". (App.B, 44a-45a)

Finally, as to Mrs. Stamp's claim for Occupational Accidental Death & Dismemberment benefits, Exxon Mobil concluded that Mr. Stamp's accident and resulting death was not "accident" or an "occupational accident" as the collision did not occur "while at work". After hearing on the Defendants joint motion for summary judgment and Plaintiff's cross motion for summary judgment, the District Court for the District of Rhode Island granted the Defendant's joint motion for summary judgment. (App. B. 61a-62a) The First Circuit, in a majority opinion, affirmed the summary judgment against the plaintiff on June 30, 2008. (App. A 1a)

REASON(S) FOR GRANTING PETITION

The Court has never resolved the conflict between the various Circuit Courts of Appeals in determining whether unintentional conduct by an insured participant while intoxicated is "accidental" or "intentional" conduct pursuant to the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C.

§ 1001, et seq.. There presently exists a wide conflict between the Circuit Courts of Appeals, and the law remains unsettled in this regard among jurisdictions pursuant to ERISA. This continued uncertainty alone justifies review. Calhoon v. Harvey, 379 U.S. 134, 137 (1964) (granting *certiorari* because of "the importance of the questions presented and conflicting views in the courts of appeals and the district courts"); Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176 (1980) (*certiorari* granted "to forestall a possible conflict in the lower courts" on an "important" issue even though there was no "direct conflict" among various district court and court of appeals opinions). Additionally, as this Court recently determined, albeit in a different context, as was pointed out in the vigorous dissent by Justice Torruella, "DUI... involves "accidental or negligent conduct". Begay v. United States, 128 S. Ct. 1581, 1587 (2008).

The First Circuit Court of Appeals also misapplied its own decision in Wickman v. Northwestern National Insurance Co., 908 F.2d 1077 (1st Cir. 1990), which requires a determination whether, under the circumstances, there was any objective expectation of death or injury, in which the Court must query whether a reasonable person, with a background and characteristics similar to the insured, would have viewed the injury as highly likely or substantially certain to occur as a result of the insured's conduct. In this instance, the First Circuit Court of Appeals determined that Mr. Stamp engaged in "risky conduct", and that injury could be the "likely outcome" of such "risky conduct", which is not the appropriate standard, and failed to determine that Mr. Stamp's fatal injuries were objectively highly likely or

substantially certain to occur as the result of his intoxication.

Finally, this Court should articulate and determine that the appropriate standard of review which the Court(s) should apply in instances where administrators of an ERISA benefit plan have discretionary authority to construe an ERISA benefit plan, where the terms of the insurance policy at issue are clearly and inherently ambiguous, is that of a de novo review and of contra proferentum, not that invoked by the First Circuit Court of Appeals, which ostensibly involves "a more abstract inquiry—the construction of someone else's construction" (App. A. 21a)

I. An accidental death claim arising out of intoxication is not a "loss caused by...intentionally self-inflicted injury...or committing or attempting to commit a felony or other serious crime or assault" but is an "accident" within the plain meaning of the terms and provisions of the insurance policy written and issued by Metropolitan Life Insurance Company to Mobil Oil Corporation and as contemplated by ERISA.

In analyzing whether a death or injury under an ERISA insurance policy is "accidental" or is otherwise an "intentionally self-inflicted injury", the various Circuit Courts have invariably relied upon the decision rendered by the First Circuit in Wickman v. Northwestern Nat'l Ins. Co., Id., See also King ex rel. Schanus v. Hartford Life and Accident Ins. Co., 357 F.3d 840 (8th Cir. 2004); Padfield v. AIG Life Ins. Co. of

Am., 290 F.3d 1121(9th Cir. 2002); West v. Aetna Life Ins. Co., 171 F. Supp. 2d 856 (N.D. Iowa 2001); Santaella v. Metro. Life Ins. Co., 123 F.3d 456 (7th Cir. 1997); Todd v. AIG Life Ins. Co., 47 F.3d 1448 (5th Cir. 1995).

These Courts have clearly held that "generally, insureds purchase accident insurance for the very purpose of obtaining protection from their own miscalculations and misjudgments". The majority of the Circuit Courts of Appeals have consistently held that a death is deemed "accidental" under a group accidental insurance policy established under ERISA if the death or injury was unexpected or unintentional. Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077 (1st Cir. 1990), et al, ***Couch on Insurance*** § 139:16 (3d Ed. 1995 and 2000 Supp.).

These Court(s) have adopted an analytical process for determining whether a death or injury was an "accident", initially based upon a determination of the insured's subjective expectation of death or injury. Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077 (1st Cir. 1990)

In the event that an analysis of the facts support a determination that the insured subjectively lacked any expectation of death or injury, an analysis must be undertaken so as to determine whether under the circumstances there was any objective expectation of death or injury. This entails an objective analysis of the insured's expectations under the circumstances. In this analysis, one must ask whether a reasonable person, with a background and characteristics similar to the insured, would have viewed the injury as highly

likely or substantially certain to occur as a result of the insured's conduct. Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077 (1st Cir. 1990), et al.

In this instance, the First Circuit Court of Appeals, misapplied its own Wickman analysis, insofar as the record clearly revealed that Mr. Stamp had no subjective expectation whatsoever of death or injury on August 2, 2002, contrary to the opinion of the First Circuit Court of Appeals. As the dissent in the First Circuit correctly pointed out "there is no evidence that Mr. Stamp's actions were the result of anything but misjudgments, not intentional actions." (App. A, 27a)

It is without dispute in the underlying record that Mr. Stamp telephoned Mrs. Stamp at approximately 5:20 P.M. on Friday, August 2, 2002, when they discussed the events of the Exxon Mobil meeting. Mr. Stamp was in good spirits, had had a "good day", saying that the weather had been "great", and that he enjoyed the boat cruise. Mrs. Stamp also indicated that he was in the process of changing his clothes to attend the business dinner at a hotel across the street from where the boat had docked. Mr. and Mrs. Stamp also confirmed their previous plans that he would stay at his parents' home in his hometown of Johnston, Rhode Island that evening since they were to attend a family gathering on Saturday, August 3, 2002, for his brother's 40th birthday. At no time during his discussion with his wife on Friday, August 2, 2002 did Stephen Stamp appear impaired; to the contrary, he sounded in good spirits, and indicated that he had had a "good day" during the day-long meeting, and was looking forward to the events of the following day. This information is verified by that provided by Exxon

Mobil and, indeed, Exxon Mobil conceded that "I think it's not clear that a drunk driver even at .24% BAC (blood-alcohol content) level is "highly likely" or "substantially certain" to die...I'm not willing to assert that intoxicated driver is "highly likely" to die." (App. B 37a-38a)

The records reveals that during the afternoon boat cruise, Mr. Stamp was in a good mood, and told other Exxon Mobil management personnel that he was going to Rhode Island the next day, and that "his wife and daughter will going to meet him there the next day and he hoped to get together with his friends, who he didn't often see, that night, but wasn't sure whether that would work out". This is consistent with that provided by Mrs. Stamp and Mr. Kingsley concerning Mr. Stamp's future plans for that night and the following morning. (App. B, 39a)

Even more critical are the observations of Mr. Stamp's Exxon Mobil's co-workers concerning Mr. Stamp during the events of August 2002. During the boat cruise, Mr. Stamp was in a good mood, and showed no signs of intoxication.

Although Mr Stamp consumed several drinks during the course of the day at the meeting and at the Exxon Mobil Company dinner, there is absolutely no evidence that Mr. Stamp was impaired. To the contrary, in response to the question raised by Exxon Mobil "What was Mr. Stamp's condition when he left?", it is conceded that "BJ (B.J. Welch) and Rick (Rick Turner) say he (Mr. Stamp) showed no signs of impairment Since BJ has worked as a bouncer in a nightclub, his comments seem particularly well-

informed. He said Mr. Stamp's speech was normal and his thoughts seemed coherent. He showed no unsteadiness and seemed alert. Rick agrees with this assessment". (App. B, 39a-40a)

This is consistent with that provided by Mrs. Stamp and Mr. Kingsley concerning their impression of Mr. Stamp's condition before and after the Exxon Mobile meeting. Clearly Mr. Stamp had no subjective expectation of death or injury subsequent to the Exxon Mobil meeting. No reasonable conclusion could be drawn otherwise based upon the record. (App. B, 39a-40a)

In conformance with Wickman, The First Circuit Court of Appeals' analysis as to whether, under the circumstances, there was any objective expectation of Mr. Stamp's death, was erroneous. Such an analysis by the First Circuit Court of Appeals should have entailed an objective analysis of Mr. Stamp's expectations under the circumstances, and which whether a reasonable person, with a background and characteristics similar to Mr. Stamp, would have viewed the injury as highly likely or substantially certain to occur. Based upon the record, it was unreasonable for the Court to reach the determination that a reasonable person would have viewed Mr. Stamp's unfortunate death as either "highly likely" or "substantially certain" to have occurred as the result of his activities on August 2, 2002.

As the District Court itself determined, there was no indication to Mr. Stamp's wife, his friend Joseph Kingsley, or any of his Mobil co-employees, based upon their observations and communications with Mr.

Stamp, that would have led anyone to form the impression that it was "substantially certain" that Mr. Stamp would have been injured or killed as a result of a car accident. To the contrary, Mr. Stamp was not impaired, was in a good mood, had enjoyed the events at the Exxon Mobil meeting, was making plans to perhaps meet a friend later that evening, and was looking forward to meeting his wife and daughter at the family gathering the next day. (App. B 37a-40a) The only reasonable determination which can be drawn is that no objective person would have viewed Mr. Stamp's death as "highly likely" or "substantially certain" to have occurred.

Courts in other jurisdictions applying the Wickman analysis have consistently held that a death is deemed "accidental" under accidental death and life insurance policies established under ERISA under the same or similar circumstances as present in this instance.

In King ex rel. Schanus v. Hartford Life and Accident Insurance Co., 357 F.3d 840 (8th Cir. 2004), the decedent was killed as the result of a motorcycle accident in which he was not wearing a helmet, was driving at an excessive rate of speed, and had a blood alcohol content of twice the legal limit. The Hartford Life and Accident Insurance Company ("Hartford") denied the beneficiaries' claim based upon the "intentional self-inflicted injury" exclusion of the ERISA accidental death insurance policy based upon the decedent's intoxication.

The Eighth Circuit Court of Appeals, in applying the Wickman analysis, while acknowledging the possible dangers of driving while intoxicated, indicated

that a person is far more likely to be arrested for driving while intoxicated than to die or to be injured in an alcohol-related automobile crash, and far more likely to arrive home than to be either arrested, injured or killed". The court indicated that subjectively the decedent intended to come home safely, and a reasonable person in the shoes of the insured would not have viewed the crash and subsequent death as "highly likely to occur". Accordingly, the Eighth Circuit Court of Appeals found that the decedent's death was "accidental" and thus covered under the applicable accidental death insurance policy. King ex rel. Schanus v. Hartford Life and Accident Ins. Co., 357 F.3d 840 (8th Cir. 2004).

In circumstances similar to that involving Mr. Stamp, in West v. Aetna Life Insurance Co., 171 F. Supp. 2d 856 (N.D. Iowa 2001), the decedent had attended a company party, and was killed as the result of a car accident returning home. At the time, the decedent was alleged to have had a blood alcohol content of three times the legal limit. Aetna denied the beneficiaries' ERISA accidental group death claim, on the basis that "the insured should have foreseen the consequences of drinking and operating a motor vehicle while intoxicated", and thereby relying upon the "intentionally self-inflicted injury" exclusion of the policy.

In applying the Wickman analysis, United States District Court for the District of Iowa determined that the insurers' denial was unreasonable, indicating there was no indication that the decedent could have subjectively appreciated that there was a high

likelihood or strong possibility of his death resulting from driving while intoxicated.

Additionally, from an objective standpoint, the court indicated even the evidence presented as to the level of intoxication was far from evidence upon which an objective conclusion could be drawn to injury or death while driving is "highly likely" to occur at that level of intoxication. The court also aptly pointed out that "While "common knowledge" should actually tell a person driving while intoxicated is that he or she is far more likely to be arrested for driving while intoxicated than to die or to be injured in an alcohol-related automobile crash, and far more likely to arrive home than to be either arrested, injured, or killed". The court finally stated that "while "common knowledge", media publicity, and statistics all demonstrate that driving drunk is irresponsible and dangerous, because the risks that come with it are preventable by the use of proper judgment, none of these things demonstrates that driving while intoxicated is so highly likely to result the injury or death that any other expectation is unreasonable". West v. Aetna Life Ins. Co., 171 F. Supp. 2d 856 (N.D. Iowa 2001)

The decedent in Padfield v. AIG Life Insurance Company of America, 290 F.3d 1121(9th Cir. 2002) died as the result of "autoerotic asphyxiation", which was defined as "the practice of limiting the flow of oxygen to the brain during masturbation in an attempt to heighten sexual pleasure". The insurer refused to pay benefits under the accidental injury and death insurance policy governed by ERISA, on the basis that the death was caused by an "intentionally self-inflicted

injury". In adopting the rationale set forth in Wickman, the 9th Circuit Court of Appeals found that there was no subjective or objective evidence that the decedent intended to cause the injuries that resulted in his death.

In denying the insurer's arguments that the decedent voluntarily engaged in a risky activity, the court pointed out that "voluntary risky acts resulting in injury are not necessarily acts that result in "intentionally self-inflicted injury". The court also aptly quoted from Wickman, agreeing that "generally, insurance purchase accident insurance for the very purpose of obtaining protection from their own miscalculations and misjudgments" finding that the decedent did not intend to die from an intentionally self-inflicted injury, but rather, "made a fatal mistake". Padfield v. AIG Life Ins. Co. of Am., 290 F.3d 1121(9th Cir. 2002)

In a similar case involving autoerotic asphyxiation, in that of Todd v. AIG Life Insurance Co., 47 F.3d 1448 (5th Cir. 1995), AIG Life Insurance Company denied the beneficiaries' accidental death insurance claim, claiming that "a death cannot be considered accidental... if from the viewpoint of the insured, his conduct was such that he should have anticipated that in all reasonable probability he would be killed". The Court found that the decedent had no subjective intention of death and also no reasonable determination of an objective intent of death could be drawn, finding that "(decedent) had been married for many years, had two children, was planning a family vacation soon, and was building a new house". The Fifth Circuit Court of Appeals, basing its analysis on

Wickman, determined that the decedent's death resulted from an "accident" within the meaning of ERISA. Todd v. AIG Life Ins. Co., 47 F.3d 1448 (5th Cir. 1995).

In Santaella v. Metropolitan Life Insurance Co., 123 F.3d 456 (7th Cir. 1997); the decedent passed away as the result of acute prescription drug intoxication. Metropolitan Life Insurance Company denied the resulting claim under the ERISA governed accidental death insurance policy based on the "intentionally self-inflicted injury" policy exclusion. The Seventh Circuit Court of Appeals determined that "we must conclude that the record requires the conclusion that (decedent) had a subjective expectation of survival and that such expectation was subjectively reasonable because death was not certain or even highly likely to result from her conduct... it was an accident". Santaella v. Metro. Life Ins. Co., 123 F.3d 456 (7th Cir. 1997).

The decedent in American Family Life Assurance Co. v. Bilyeu, 921 F. 2d 87 (6th Cir. 1990) was killed as the result of a one car accident after which he was observed at traveling at an estimated speed of 55 to 60 mph in a 35 mile per hour zone. It was later determined that his blood alcohol content was at least two times the legal limit. American Family Life Insurance Company denied the resulting claim on the basis of the "intentionally self-inflicted injury" policy exclusion, and argued that the decedent could have foreseen his car accident as the probable result of his intoxication". The Sixth Circuit Court of Appeals determined that the decedent's death under the circumstances was indeed "accidental" within the terms of the accidental death insurance policy,

determining that a death is accidental absent a showing that the death was the result of a plan, design or intent on the part of the decedent". Am. Family Life Assurance Co. v. Bilyeu, 921 F. 2d 87 (6th Cir. 1990).

Other state and federal courts analyzing whether a death under the same or similar circumstances is "accidental" or was otherwise an "intentionally self-inflicted injury" have reached similar conclusions. In Harrell v. Minnesota Mutual Life Insurance Co., 937 S.W. 2d 809 (Tenn. 1996), the decedent died as the result of a motor vehicle accident, after which it was determined that she had a blood alcohol level twice the existing legal limit. Minnesota Mutual Life Insurance Company denied the claim on the basis that the decedent's death was not accidental, since it was the foreseeable result of her driving an automobile under the influence of an intoxicant.

The Supreme Court of Tennessee held that the insured's death was accidental, despite her voluntary intoxication, since she did not intend or expect death to result from her driving under the influence of alcohol. Harrell v. Minnesota Mut. Life Ins. Co., 937 S.W. 2d 809 (Tenn. 1996).

In Freeman v. Crown Life Insurance Co., 580 S.W. 2d 897 (Tex. 1979), the insured was killed as the result of a motor vehicle accident, after which it was established that his blood alcohol content was at least twice the legal limit. The insured denied the resulting claim on the basis that the death was not accidental since it was the foreseeable result of driving while under the influence of alcohol.

The Court of Civil Appeals for Texas ruled otherwise, relying upon the majority rule as set forth in Appleman ***Insurance Law and Practice***, that "while drunken driving is dangerous and should be prevented, the public still regards such an accident as "accidental". The court also said that for such an incident to be not accidental, "more is required any simple showing that the insured could have reasonably foreseen that injury or death might result... unquestionably, driving while intoxicated is a serious violation of the law and an extremely dangerous act, but we do not believe it is such an act that one who commits it can be said to reasonably known that it will probably bring about his own death". Freeman v. Crown Life Ins. Co., 580 S.W. 2d 897 (Tex. 1979).

In Collins v. Nationwide Life Insurance Co., 294 N.W. 194 (Mich. 1980), the decedent died of voluntary acute alcohol intoxication, with a blood alcohol level of approximately four times the legal limit existing in Michigan. The Michigan Supreme Court indicated that where the insured died as the result of voluntary intoxication, but did not intend or expect death to result, such death was accidental for purposes of an accidental death insurance policy. The court stated that in order to defeat recovery under the policy "the insured must have intended or expected that his conduct would in all probability result in death. Negligence alone is not sufficient to prevent the death from being an accident within the meaning of the policy". Collins v. Nationwide Life Ins. Co., 294 N.W. 194 (Mich. 1980).

The decedent in Cranfill v. Aetna Life Insurance Co., 49 P.2d 703 (Okla. 2002), was killed in a one

vehicle accident, and that the same several bottles of alcohol were founded his vehicle. The time of death, the decedent's blood alcohol level was 254 mg/dL, more than 2 ½ times the legal limit for operating a motor vehicle in Colorado. The insured denied the claim for benefits under an accidental death policy on the basis that the decedent's death was not the result of an "accident" and or was "intentionally self-inflicted".

The Oklahoma Supreme Court determined that the decedent's conduct of intentionally driving while intoxicated was not the equivalent of his intent or plan to cause his death. The court concluded that a death is not intently self-inflicted for purposes of an accidental death policy merely because it resulted from engaging in negligent or even grossly negligent conduct, unless the insured intended to cause his own death. The court then stated that to hold otherwise would be contrary to the expectations of insureds that have purchased accidental death insurance to protect their beneficiaries". Cranfill v. Aetna Life Ins. Co., 49 P.2d 703 (Okla. 2002)

All of these decisions by various state and federal courts have unequivocally determined that an incident and resulting death is "accidental" under the terms and provisions of an accidental death insurance policy under circumstances where the decedent did not expect or intend for death to result. As the dissent in the First Circuit pointed out, "...those circuits that have examined insurance policy exclusions similar to the ones that issue here, using a "highly likely" or "substantially certain" standard, are the ones that have reached the correct answer to the question", determining that an accidental death claim arising out

of intoxication is not a loss caused by intentionally self-inflicted injury, but is an "accident". (App. A 25a). This conclusion is supported by this Court's recent determination that "DUI... involves "accidental or negligent conduct". Begay, 128 S. Ct. at 1587.

II. The First Circuit Court of Appeals erred in its analysis by determining that death resulting from driving under the influence of alcohol was "likely"" to result, in view of the case law which refutes this interpretation and statistical evidence set forth within the record demonstrating the statistical probability of a fatal accident resulting while driving under the influence of alcohol is 1.19%, or approximately One (1) in One Hundred (100).

In this instance, the District Court and the First Circuit Court of Appeals erred by discounting the statistical evidence offered by Mrs. Stamp and which was obtained from the federal government which is directly to the contrary to the conclusion drawn by Metropolitan Life Insurance Company and or Exxon Mobil. The statistical evidence reveals in the year prior to Mr. Stamp's death, 1,434,852 arrests were made for driving under the influence of alcohol.

Common sense, if nothing else, makes it plain that not every intoxicated driver is arrested for driving under the influence of alcohol in any given year, let alone every time he or she is intoxicated. Additionally, statistics compiled by the United States Department of Transportation, National Highway Traffic Safety Administration, National Center for Statistics and

Analysis, revealed that in the same year, 2001, there were 42,116 fatalities resulting from motor vehicle accidents. Of these 42,116 fatalities resulting from motor vehicle accidents, 17,447 were alcohol **"related",** not necessarily concerning the operation of a motor vehicle under the influence of alcohol, which comprises 40% of the total fatalities resulting from motor vehicle accidents.

Based upon these federal governmental statistics, assuming that an arrest results every time one drives a motor vehicle under the influence of alcohol, the statistical probability of a fatal accident resulting while driving under the influence of alcohol is 1.19%, or approximately One (1) in One Hundred (100). These statistics establishes that it cannot be reasonably concluded by either common sense or legal analysis that death resulting from driving under the influence of alcohol is either "reasonably foreseeable" as concluded by Metropolitan Life Insurance Company and Exxon Mobil, certainly not "highly likely" or "substantially certain" to result as required by established law. Indeed, Exxon Mobil conceded that "it's not clear that a drunk driver even at .24% BAC (blood-alcohol content) is "highly likely" or "substantially certain" to die. As Justice Torruella correctly pointed out in the First Circuit dissenting opinion, "given this, (statistics provided by plaintiff) it can be said that 'a reasonable person would not view death as 'highly likely' to result from driving drunk". (App A. 28a)

The First Circuit Court of Appeals in its analysis as to whether a reasonable person, with a background and characteristics similar to the insured, would have

objectively viewed the injury as "highly likely" or "substantially certain" to occur as a result driving under the influence of alcohol, erroneously equated the act of driving under the influence of alcohol with that of Russian roulette. Undoubtedly it can be said with some degree of assurance that many have unfortunately driven while under the influence of alcohol.

It can also be said with some degree of assurance that many have not engaged in the game of Russian roulette, where "the point of the game is to see if you are lucky enough to live". (App. A. 30a). As the dissent aptly pointed out, "Drunk driving is, to be sure, a foolish and reckless act...No doubt Mr. Stamp's decision to drive that while intoxicated was risky 'but voluntary risky acts resulting in injury are not necessarily acts that result in "intentionally self-inflicted injury"'. (App. A 30a, 32a), quoting Padfield v. AIG Life Ins. Co. of Am., 290 F.3d 1121 (9th Cir. 2002).

III. The Court should articulate and determine that the appropriate standard of review which the Court(s) should apply in instances where administrators of an ERISA benefit plan have discretionary authority to construe an ERISA benefit plan, where the terms of the insurance policy at issue are clearly and inherently ambiguous, is that of a de novo review and of contra proferentum, not that invoked by the First Circuit Court of Appeals, which ostensibly involves "a more abstract

inquiry—the construction of someone else's construction"

It is well established that the benefit provisions of an ERISA regulated group insurance program are customarily and typically interpreted under principles of federal substantive law. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56, 107 S.Ct. 1549, 95 L.Ed.2d39 (1987), United McGill Corp. v. Stinnett, 154 F. 3rd 1968 (4th Cir. 1998); Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077 (1st Cir. 1990). In interpreting the benefit provisions of ERISA insurance policies, it is equally well established that Court in most instances apply the basic tenets of contract interpretation and will look to the definition in the terms of the policy contract itself. Id.

The various Circuit Courts have held that the reasonable expectations of the insured party govern the interpretation of policy terms, and no insurer can rely upon confusing policy language to put an obstacle between an injured party and the benefits provided by the policy. In reviewing plans established under ERISA, typically federal common-law rules of contract interpretation govern, in which is well established that it is required to "interpret the terms of the policy in an ordinary and popular sense, as would a person of average intelligence and experience". Santaella v. Metro. Life Ins. Co., 123 F.3d 456 (7th Cir. 1997).

When insurance plan terms are ambiguous after applying ordinary principles of contract interpretation, Courts have customarily determined that the policy terms should be construed strictly against the insurer and in favor of the insured in order to afford the

protection which the insured was endeavoring to seek when he applied for the insurance. Santaella v. Metrop. Life Insu. Co., 123 F.3d 456 (7th Cir. 1997); Todd v. AIG Life Ins. Co., 47 F.3d 1448 (5th Cir. 1994); Delk v. Durham Life Ins. Co., 959 F.2d 104 (8th Cir. 1992), ***Couch on Insurance 2d*** § 41:9, 13 (3d Ed. 1995 and 2000); 13 Appleman ***Insurance Law and Practice*** § 7401 at 197 (1981).

As discussed above, the First Circuit Court of Appeals indicated that "insureds' purchase accident insurance for the very purpose of obtaining protection from their own miscalculations and misjudgments". Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077 (1st Cir. 1990).

However, the First Circuit Court of Appeals Courts in issuing its decision, failed to review the insurance plan terms to determine whether the applicable terms were ambiguous and therefore not relying upon the rule of contra proferentem, which other Courts have held is invoked only when Courts undertake a de novo review of plan interpretations. Phillips v. Lincoln Nat'l Life Ins. Co., 978 F.2d 302, 311 (7th Cir.1992).; Winters v. Costco Wholesale Corp., 49 F.3d 550, 554 (9th Cir.1995). Other Courts making a deferential review of such determinations have determined no occasion to employ the rule of contra proferentem.

These Courts have held that deferential review does not involve a construction of the terms of the plan; it involves a "more abstract inquiry--the construction of someone else's construction". Phillips v. Lincoln Nat'l Life Ins. Co., 978 F.2d 302, 311 (7th

Cir.1992).; Winters v. Costco Wholesale Corp., 49 F.3d 550, 554 (9th Cir. 1995).

A more reasoned approach, which the Petitioner urges the Court to adopt, in instances where the Court reviews and analyzes terms of an insurance plan established under ERISA, is to apply federal common-law rules of contract interpretation, in which the Court is required to "interpret the terms of the policy in an ordinary and popular sense, as would a person of average intelligence and experience". Santaella v. Metro. Life Ins. Co., 123 F.3d 456 (7th Cir. 1997); et al.

In this instance, Metropolitan, as any other insurer authoring policies established pursuant to ERISA, drafted the policy at issue and could have easily inserted a policy provision that explicitly excluded coverage for injuries or deaths resulting from intoxication. As the First Circuit Court of Appeals aptly itself pointed out in Wickman v. Northwestern National Insurance Co., 908 F.2d 1077 (1st Cir. 1990), terms like "accident" included within the provisions of an ERISA regulated group insurance program "should be judged from the standpoint of the insured" and that the "reasonable expectations of the insured when the policy was purchased is the proper starting point for a determination of whether an injury was accidental under its terms" Id. at 1088.

Courts have clearly indicated insurers may relieve themselves of the obligation for coverage for certain injuries or deaths by inserting or including the appropriate policy exclusion. For example, in Harrell v. Minnesota Mutual Life Insurance Co., 937 S.W. 2d 809 (Tenn. 1996) as discussed above, the Supreme

Court of Tennessee correctly adopted the majority view that "Insurance companies draft the policies... and are, therefore, free to exclude injury or death that results from reckless and foolhardy acts. With simplicity and clarity of expression they may remove all doubt". Id at 814.

As the court pointed out in West v. Aetna Life Insurance Co., 171 F. Supp. 2d 856 (N.D. Iowa 2001), "life insurance companies have ample ways to avoid judgments like this one, including insertion of an express "intoxication" exclusion into an accidental death policy". Id. at 896. In Collins v. Nationwide Life Insurance Co., 294 N.W. 194 (Mich. 1980), the Michigan Supreme Court, under similar circumstances, held that "one who purchases an accidental death policy intends to provide benefits to his beneficiary in the event that he should suffer death resulting from accident as opposed to death resulting from other means, such as suicide, disease or natural death.. Insurance policies upon which the public relies for security in case of accident should be free from fine distinctions which few can understand until pointed out by lawyers and judges". Id. at 197.

The Court of Civil Appeals for Texas also correctly stated that "there is no doubt that the ordinary person who is insured by an accident insurance policy would consider his death in an automobile collision accidental even though at the time of the collision he may be intoxicated or otherwise negligent. If the (insurer) decided to exclude from coverage any death occurring in such circumstances, it could have easily done so by inserting in the policy an appropriate exclusion".

Freeman v. Crown Life Ins. Co., 580 S.W. 2d 897 (Tex. 1979).

Terms like "accident" included within the provisions of an ERISA regulated group insurance program should be judged from the standpoint of the insured and that the reasonable expectations of the insured when the policy was purchased is the proper starting point for a determination of whether an injury was accidental under its terms. Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077 (1st Cir. 1990). As Justice Torruella pointed out in the First Circuit dissenting opinion, "accepting that Mr. Stamp had a BAC above the legal limit and that he was in a one car collision with no other evidence of why he veered off the road and hit a tree, it is fair to say that, at most, Mr. Stamp miscalculated and misjudged his ability to drive that fateful evening. He purchased insurance in order to protect himself and his family against such unforeseen accidents". (App. A. 27a)

Notwithstanding its contention in its denial of Mrs. Stamp's claim that "the act of driving while so impaired rendered the infliction of serious injury or death reasonably foreseeable and hence not accidental as contemplated by the plan", Metropolitan drafted the policy at issue and could have easily inserted a policy provision that explicitly excluded coverage for injuries or deaths allegedly resulting from intoxication. Its failure to do so should be strictly construed against Metropolitan in order to afford the protection and provide the benefits which Mr. Stamp was seeking when he applied for and paid for the insurance.

CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment and opinion of the First Circuit Court of Appeals.

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